

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COMPUWARE CORPORATION,
a Michigan Corporation,

Case No. 04-73749

Plaintiff/
Counterclaim Defendant,

District Judge Anna Diggs Taylor

Magistrate Judge R. Steven Whalen

v.

OPNET TECHNOLOGIES, INC.,
a Delaware Corporation,

Defendant/
Counterclaim Plaintiff.

ORDER

Before the Court is Defendant's Motion to Sanction Plaintiff for Failure to Produce Information Relevant to its Claim for Damages [Docket #91], which has been referred for hearing and determination pursuant to 28 U.S.C. §636(b)(1)(A). This Motion will be submitted on the pleadings¹, without oral argument. *See* E.D. Mich. L.R. 7.1(e)(2).

Defendant claims that Plaintiff has failed in its discovery obligations as to (1) Rule 26 disclosures²; (2) Opnet's First Set of Interrogatories, Nos. 4, 8, and 12, and Opnet's First Requests for Production of Documents, Nos. 5, 11, and 18; and (3) this Court's order of May 23, 2005, granting in part and denying in part Defendant's Motion to Compel Discovery. That order included directives as to the above-mentioned Interrogatories and Document

¹The Court has reviewed Defendant's Motion, including Exhibits A through K; Plaintiff's Brief in Opposition, including Exhibits 1 through 10; and Defendant's Reply Memorandum, including an additional 173 pages of exhibits.

² Fed.R.Civ.P. 26(a).

Requests. The discovery that Defendant claims has not been provided relates to the issue of damages.

The Court has reviewed the Rule 26 disclosures of Plaintiff Compuware (Opnet's Exhibit H) and Defendant Opnet (Compuware Exhibit 10), and finds them to be remarkably similar. In other words, if, as Opnet claims, Compuware's disclosures are deficient, they are no more so than Opnet's. While Compuware's disclosures could be more detailed, both parties' disclosures conform to the minimum requirements of Rule 26.

As to Opnet's Document Requests 5, 11 and 18, the Court's May 23, 2005 order indeed compelled this discovery, but with the observation, in footnote 1, that "the parties indicated prior to the hearing that they had resolved these document requests consistent with the language of this order." Thus, it is most annoying to the Court that this is still an issue. Nevertheless, Plaintiff states that it has provided all documents responsive to these requests, with the exception of documents protected by attorney-client and/or work product privilege. This is consistent with the language of the order.³ The Court takes Plaintiff at its word, with the caveat that if it is learned that discoverable material was improperly withheld, severe sanctions are available. Remember Morgan Stanley.

The Court has also reviewed Plaintiff's responses to Opnet's Interrogatories 4, 8 and 12, which are contained in Defendant's Exhibit J. The responses are set forth in narrative and chart form, and specifically address damages factors as set forth in *Panduit Corp. V. Stahlin Brothers Fiber Works, Inc.*, 575 F.2d 1152 (6th Cir. 1978) and *Georgia Pacific Corp. V. United States Plywood Corp.*, 318 F.Supp. 1116 (S.D.N.Y. 1970). Again, it appears that Plaintiff has complied with the Court's May 23rd order.

³The May 23rd order also directed that Plaintiff provide a privilege log as to any material withheld on the basis of privilege.

Rule 37 sanctions are, of course, addressed to the Court's discretion. In this instance, after thorough review of the pleadings and exhibits, the Court finds no basis to impose sanctions at this time. Accordingly, Defendant's Motion [Docket #91] is DENIED.

SO ORDERED.

S/R. Steven Whalen
R. STEVEN WHALEN
UNITED STATES MAGISTRATE JUDGE

Dated: January 11, 2006

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing order was served on the attorneys and/or parties of record by electronic means or U.S. Mail on January 11, 2006.

S/Gina Wilson
Judicial Assistant